

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-6146

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee,

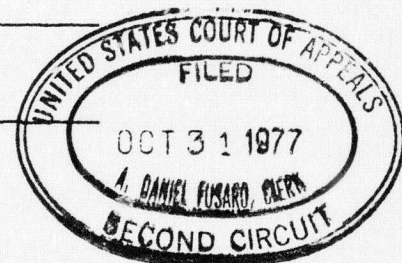
v.

190 PIECES OF GOLD JEWELRY,

Defendant-Appellant.

Docket No. 77-6146

BRIEF FOR APPELLANT



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INDEX

	Page
PRELIMINARY STATEMENT.....	1
STATEMENT OF FACTS.....	2
ISSUES TO BE DECIDED.....	3
ARGUMENT.....	4
CONCLUSION.....	6

TABLE OF CASES

UNITED STATES v. ONE LOT EMERALD CUT STONES AND ONE RING 461 F. 2d 1189.....	6
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
190 PIECES OF GOLD JEWELRY,
Defendant-Appellant.

Docket No. 77-6146

BRIEF FOR APPELLANT

PRELIMINARY STATEMENT

The United States of America instituted a libel seeking the condemnation of 190 Pieces of Gold Jewelry seized from an automobile driven by the respondent Herman Klein at the Peace Bridge entrance into this Country from Canada. The described libel was predicated upon an alleged violation of Title 19 Section 1497 of the United States Code.

The respondent, by his answer, challenged the validity of the January 6, 1972, seizure. The trial of the described litigation was assigned to the Honorable John T. Curtin. Subsequent thereto and by stipulation of counsel, this matter was referred to the Honorable Edmund F. Maxwell, a United States Magistrate for the Western District

of New York at Buffalo.

Trial was held before the Magistrate on December 20, 1976, and February 22, 1977; decision was rendered on June 30, 1977. The Court there determined that the jewelry seized on January 6, 1972, be forfeited to the United States and that Herman Klein be liable to a penalty to the United States in the sum of \$21,038.00.

An order to that effect was entered with the Clerk of the United States District Court for the Western District on June 30, 1977. A notice of appeal therefrom was taken on August 29, 1977.

STATEMENT OF FACTS

At about 10:30 in the evening on January 6, 1972, the now appellant, Herman Klein, drove his automobile, bearing Ontario registration plates, to customs inspection at the Peace Bridge exit from Canada to Buffalo, New York.

It is agreed that the facts described in the decision rendered by the Magistrate on June 30, 1977, are accurate; that indeed the respondent, Herman Klein, lied in response to many questions asked of him by the Inspector, and that he continued to lie when directed to the secondary inspection area. It was not until the automobile driven by the respondent was searched that the jewelry made the subject of this libel was disclosed.

Additional interrogation of this respondent at that time evoked responses from him to the effect that he did not believe he was obligated to declare the secreted jewelry because it had been

manufactured in the United States, packed by the respondent into his automobile and taken with him in traveling from New York City to Toronto and return. It was at this point that the jewelry was seized by the customs officials.

The factual determination made by the Magistrate in his decision that the only testimony in support of the respondent's position that the jewelry seized was of domestic origin, came from the respondent; that because of the acknowledged lies told by the respondent at the time of the January 6th seizure, he considered that testimony insufficient to support the claim of domestic origin. Additionally, that if the jewelry was of domestic origin, it remains subject to forfeiture because of Klein's failure to make a declaration at the Peace Bridge entrance into this Country.

This appeal challenges each of those determinations.

ISSUES TO BE DECIDED

1. Whether in the absence of any testimony during the trial challenging the testimony given therein by the Appellant Klein that all of the merchandise seized from his automobile on January 6, 1972, was secreted earlier in his automobile before the trip from New York to Toronto began, the Magistrate could determine that the falsehoods told deliberately by the Appellant at the time of seizure, in and of themselves were sufficient to arrive at that conclusion.

2. Whether the Magistrate was correct in his determination that a mere failure to declare the jewelry at customs was sufficient

to justify the seizure and consequent forfeiture.

3. Whether, if each of the above issues are decided in the affirmative, the additional fine of \$21,038.00 was reasonable.

ARGUMENT

1. The record is devoid of any testimony which would demonstrate that the respondent Klein did not pack the jewelry into his automobile before the trip from New York to Toronto and return began.

The record of the testimony demonstrates that sometime prior to January 6, 1972, the respondent Klein personally secreted the jewelry in question into his vehicle at 145 West 45th Street in New York. There is no testimony from any of the witnesses in support of the libel which would create any suspicion that this was not the location from which the jewelry and watch attachments were secreted.

Undoubtedly the numerous lies by the respondent to the customs officers at the Peace Bridge, give rise to a suspicion that the respondent was not truthful in other areas about which he was interrogated. It is submitted to this Court for its consideration that absent any specific affirmative testimony that the merchandise secreted was not packed in New York, the untruths hitherto related by the respondent were insufficient in and of themselves to permit the Magistrate to determine that there was insufficient

evidence that the property seized was hidden into the automobile in New York.

2. The appellant does not dispute any of the material facts as stated by the Government. It is appellant's position, however, that all of the various items of jewelry which constitute the res in this proceeding were either manufactured and/or purchased in the United States of America by the said Herman Klein and were in his possession when he entered Canada for the sojourn which immediately preceded the events of January 6, 1972.

It is further the contention of the appellant that the said items remained in his possession during the entire sojourn; that their nature and character was not modified, changed nor altered in any way, shape or form prior to his re-entry into the United States of America.

The appellant agrees with the Government that the instant action is in the nature of a civil proceeding pursuant to Title 19 U.S.C. 1497 and, therefore, the Government has no burden to establish a specific intent to defraud the United States, as it would have were the proceedings brought pursuant to Title 18 U.S.C. 545.

The appellant submits, however, that in order for items of property to be seized and subject to forfeiture under Title 19 U.S.C. 1497, such items of property must have been acquired by their possessor during the foreign sojourn immediately prior to the entry giving rise to the seizure.

If the articles had been purchased or manufactured in the

United States by the possessor thereof and were in his possession upon leaving the United States and their character and form was not changed by the addition of property or materials acquired in the foreign jurisdiction, such articles would not be subject to the tariff laws of the United States. Not being subject to the tariff laws of the United States, they could not be subject to seizure under 19 U.S.C. 1497, since the only purpose of this section is to aid in the enforcement of tariff laws and the collection of duties imposed pursuant thereto. See United States v. One Lot Emerald Cut Stones and One Ring, 461 F. 2d 1189.

3. The judgment of the Magistrate that there be an additional fine of some \$21,038.00 imposed upon Herman Klein is excessive to the point of being confiscatory, particularly since the described fine is not intended as a penalty for alleged criminal behavior.

CONCLUSION

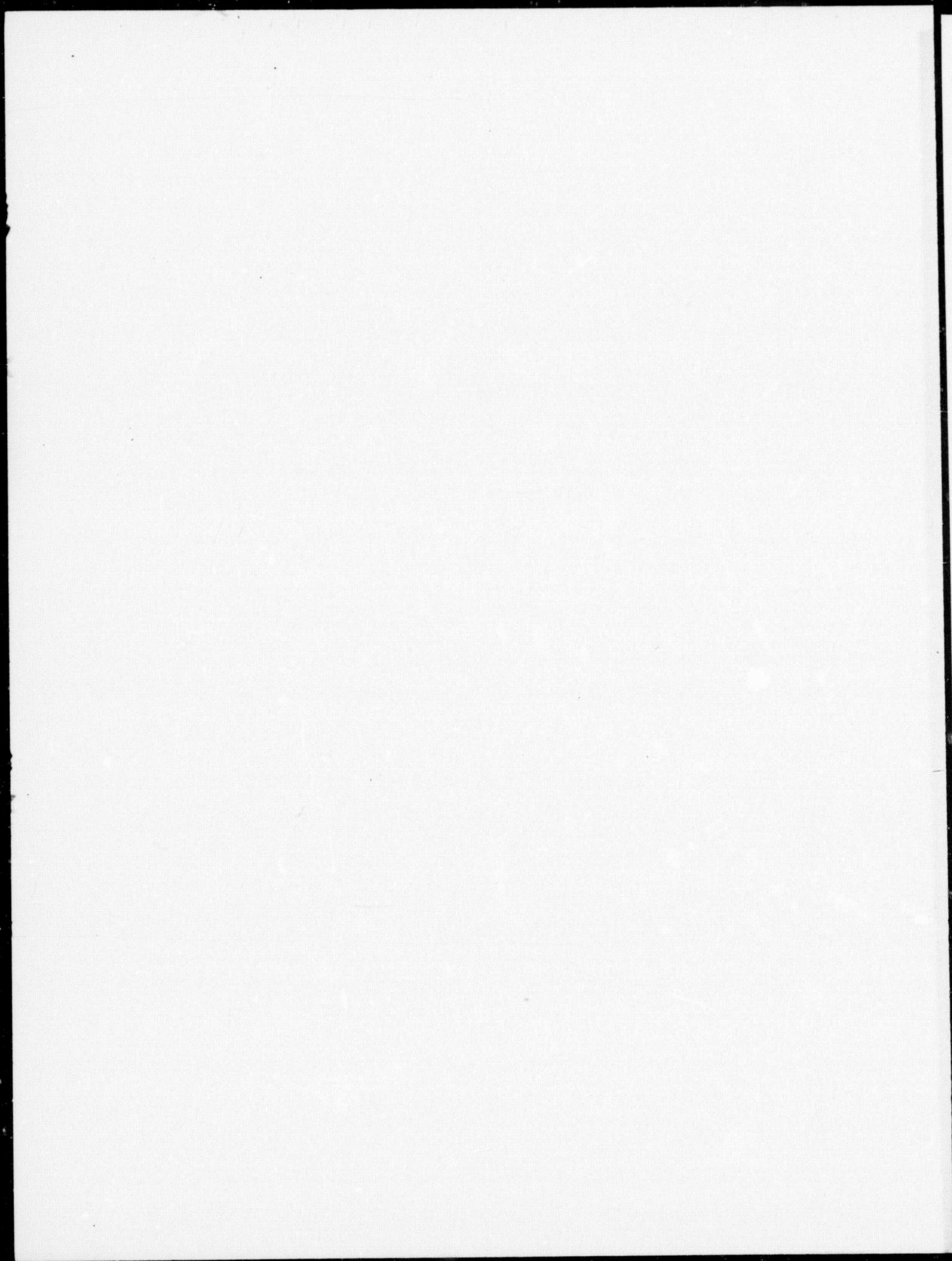
1. The decision of the Magistrate that he could not believe that the property seized from the appellant's automobile on January 6, 1972, is without support factually. This conclusion is arrived at because the respondent lied in other areas of responses to detailed interrogation.

2. The Court erred in its determination that merchandise secreted in the automobile at the point of origin of the trip to Canada and return required a declaration upon the return to this Country.

3. The fine of \$21,038.00 imposed was arbitrary, capricious and unwarranted by the factual circumstances described in the record of testimony.

Respectfully submitted,

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FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

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190 PIECES OF GOLD JEWELRY

Defendant-Appellant

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

SALTEN RODENBERG, being duly sworn, deposes and says:

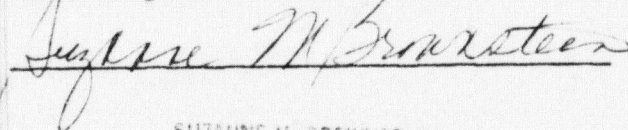
That he is the attorney for the defendant-appellant above
named.

That on the 28th day of October, 1977, he served copies of
the Brief for appellant and appendix on the United States Attorney,
United States Courthouse, Buffalo, New York.


Salten Rodenberg

Sworn to before me this

28th day of October, 1977



SUZANNE M. BROWNSTEIN
COMMISSIONER OF DEEDS
In & for the City of Buffalo
My comm. expires Dec. 31, 1978